CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 120

FREDERICK W. FINK AND ALBERT PLAUT, TRADING AS LEHN & FINK, APPELLANTS,

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED FEBRUARY 6, 1896.

(16,176.)

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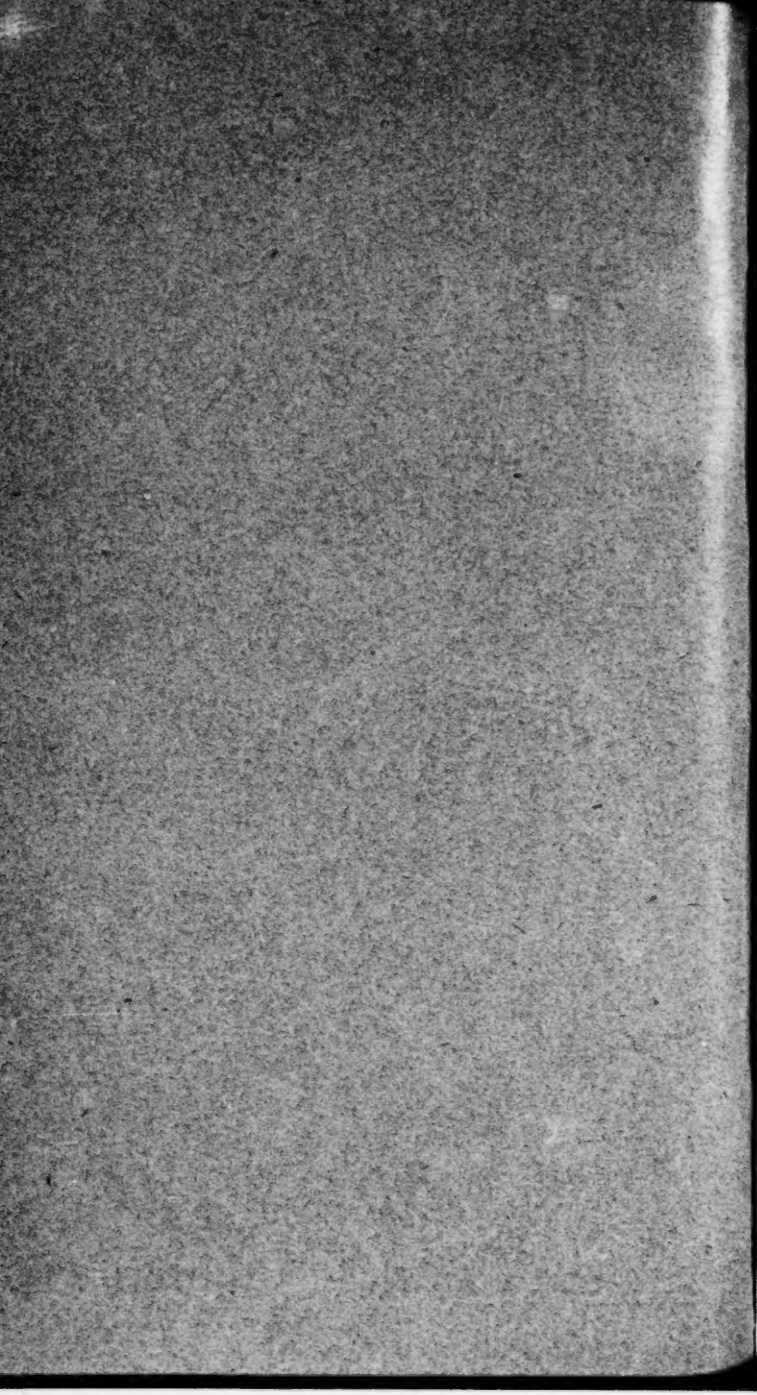

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 18, 1897.

1 United States Circuit Court of Appeals for the Second Circuit.

FREDERICK W. FINK and ALBERT PLAUT, Trading as Lehn & Fink, in the Matter of Their Importation per "Chester," April 6, 1894, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee. } Suit A. No. 2031.

Certificate for Instructions.

A judgment or decree of the circuit court of the United States for the southern district of New York having been made and entered February 4, 1895, by which it was ordered, adjudged, and decreed that there was no error in certain proceedings herein before the board of U. S. general appraisers, and that their decisions herein be, and the same are hereby, in all things affirmed, and an appeal having been taken from said judgment or decree to this court by the above-named appellants, and the cause having come on for hearing and argument in this court, certain questions of law arose concerning which this court desires the instruction of the Supreme Court of the United States for its proper decision. The facts out of which such questions arose are as follows:

The firm of Lehn & Fink imported into the port of New York, on April 6, 1894, certain parcels of muriate or hydrochlorate of cocaine in crystals, on which duty was exacted at twenty-five per
2 cent. ad valorem, under paragraph 76 of the tariff act of October 1, 1890, as a chemical salt. The importers duly and seasonably protested against such exaction, upon the ground that the merchandise was dutiable at fifty cents per pound under paragraph 74 of the same act as a medicinal preparation in the preparation of which alcohol is used. After decisions by the board of general appraisers and by the United States circuit court of New York the question duly came by appeal from the decision of the circuit court to this court.

Paragraphs 74 and 76 of said act are as follows:

"74. All medicinal preparations, including medicinal proprietary preparations, of which alcohol is a component part, or in the preparation of which alcohol is used, not specially provided for in this act, fifty cents per pound."

"76. Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts, not specially provided for in this act, twenty-five per centum ad valorem."

Muriate of cocaine is an alkaloidal salt and is a chemical salt produced by combination of the alkaloid cocaine and muriatic acid. Salts are either alkaloidal or alkaline, produced by combination of either alkaloid or alkalies with acids. In its preparation alcohol is necessarily used as a solvent. Muriate of cocaine is a medicinal preparation and is known as such by the physician, the chemist, the druggist, and in commerce, and was so known definitely, gen-

erally, and uniformly at and prior to the enactment of the tariff law of 1890. The term "salts" or "chemical salts" is a generic term and includes a commercial class of articles known by
3 chemists and by pharmacists and druggists at the date of the passage of the tariff act as covering, among others, muriate of cocaine. The commercial meaning of the term medicinal preparation is the same as its ordinary meaning, viz., a substance used solely in medicine and prepared for the use of the apothecary or physician to be administered as a remedy in disease. Muriate of cocaine is dispensed in the form in which it is imported, or more often reduced therefrom to a powder by means of a mortar and pestle, or diluted in water or admixed with inert or neutral matter.

The number of chemical salts is excessively large. A very small proportion of this number is used in medicine or as medicinal preparations. There is no adequate testimony in regard to the relative number of imported or importable medicinal preparations in the preparation of which alcohol is used, and of imported or importable chemical salts. The testimony does not disclose which paragraph includes the greater number of articles.

Upon the foregoing facts the questions to be certified are:

1. Is muriate of cocaine properly dutiable under paragraph 74 of the tariff act of October 1, 1890?

4 2. Is muriate of cocaine properly dutiable under paragraph 76 of the tariff act of October 1, 1890?

And to that end this court hereby certifies such questions to the Supreme Court of the United States.

New York, January 24, 1896.

WM. J. WALLACE,
E. HENRY LACOMBE,
N. SHIPMAN,
Circuit Judges.

5 UNITED STATES OF AMERICA, *Second Circuit,* } *ss:*

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the cause entitled Frederick W. Fink and Albert Plaut, trading as Lehn & Fink, in the matter of their importation per "Chester," April 6, 1894, appellants, *vs.* The United States of America, appellee (suit A, No. 2031), was duly filed and entered of record in my office by order of said court on the 24th day of January, 1896, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Second Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of the State of New York, this 31st day of January, in the year of our

Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

JAMES C. REED,
Clerk United States Circuit Court of Appeals
for the Second Circuit.

[Endorsed:] U. S. circuit court of appeals, second circuit. Frederick W. Fink and Albert Plaut, trading as Lehn & Fink, in the matter of their importation per "Chester," April 6, 1894, appellants, *vs.* The United States of America, appellee. Certificate for instructions. United States circuit court of appeals, second circuit. Filed Jan. 24, 1896. James C. Reed, clerk.

Endorsed on cover: Case No. 16,176. U. S. circuit court of appeals, second circuit. Term No., 120. Frederick W. Fink and Albert Plaut, trading as Lehn & Fink, appellants, *vs.* The United States. Filed February 6, 1896.

No. 120.

Brief of Comstock for Appts.

NOV 1 18
JAMES H. McKEEN

Supreme Court of the United States.

Filed Nov. 1, 1897.

FREDERICK W. FINK and ALBERT PLAUT,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR APPELLANTS.

ALBERT COMSTOCK,
Of Counsel for Appellants.

COMSTOCK & BROWN,
Attorneys and Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

Supreme Court of the United States.

FREDERICK W. FINK and ALBERT PLAUT, Appellants, vs. THE UNITED STATES OF AMERICA, Appellee.	No 120.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for Appellants.

We desire to discuss this case upon two points; first, the questions submitted in the certificate, and second, the judicial decisions in other cases, which caused the certificate to be made.

I.

As to the questions submitted.

Although two-fold in form, these are substantially but one, viz: is muriate of cocaine more properly dutiable under paragraph 74 of the tariff act of Oct. 1, 1890, or under paragraph 76 thereof? The appellants' contention is that paragraph 74 provides the proper classification, according to thoroughly established principles for the interpretation of statutes, and according to numerous decisions of this court. Either paragraph, 74 or 76,

if viewed by itself, takes some hold of muriate of cocaine ; paragraph 76 by reason of its chemical status or derivation, it being in fact a salt ; and paragraph 74 by its intrinsic character, since it is a preparation and not a natural product ; its method of production, since alcohol is used in its preparation ; and its sole object of existence, since it is a medicine. The question is, therefore, which paragraph has the better, broader and more exact hold of the merchandise,—which being determined, the other paragraph must relinquish its hold. Neither is in its terms exclusive, but each is qualified by the words " not specially provided for ", meaning, not elsewhere in the same act.

Paragraph 74 is more definite than Paragraph 76.

It describes with incomparably greater precision the group of articles within its scope. " Salts " or " chemical salts ", is the vaguest of terms. It suggests no definite association of articles. This is manifest from the ordinary definitions of the word " salt " which follow :

Webster—" A combination of an acid with a base, forming a compound which has properties differing from those of either component."

Worcester—" A term applied to a very large class of compounds, having no characteristic property common to them all, consisting each of two components, simple or compound, and possessing properties materially different from those of either of its components ".

Century—" Any acid in which one or more atoms of hydrogen have been replaced with metallic atoms or basic radicals ; any base in which the hydrogen atoms have been more less replaced by non-metallic atoms or acid radicals ; also the product of direct union of a metallic oxid and an anhydrid ".

The notes *in extenso* which follows these definitions merely serve to render more complete the obscurity which they produce. Thus there is no common characteristic of salts. They are either natural products in the mineral, vegetable or animal world, or the results of elaborate manufacture. They are derived from every department of matter. They are a mere way-station upon the road by which materials travel, in their transformation into articles of consumption, of apparel or of ornament. They enter into every field of employment, dyeing, medicine, manure, poison, perfumery, food, ornament. The term gives no idea of ultimate derivation, character, value, employment or physical characteristics. An enumeration more formless, vague and unsatisfactory is not to be found in the tariff laws.

"Medicinal preparations" is a very different sort of a term. It bristles with characteristics. Observe its definition as given in the certificate: "The commercial meaning of the term medicinal preparations is the same as its ordinary meaning, viz: a substance used solely in medicine and prepared for the use of the apothecary or physician to be administered as a remedy in disease". Thus are presented at once the attributes of special preparation and of special use. Of these the use is unquestionably the controlling one. Not only is this a beneficent use, peculiarly certain to identify as members of a special class those products which subserve it, but it is a well established doctrine, frequently asserted by this court, that a provision in the tariff laws for any article according to its use takes precedence over a provision for it by trade designation or other characteristics.

Arthur vs Jacoby, 103 U. S.—13 Otto—677.
Robertson vs Salomon, 130 U. S. 412.
Magone vs Heller, 150 U. S. 170.

Since the term "medicinal preparations" is thus more definite than the term "chemical salts", the superiority of paragraph 74 as providing for a product like muriate of cocaine, is still clearer when we observe

that the tariff law has divided medicinal preparations for purposes of classification into two groups, alcoholic and non-alcoholic, the former finding a place in paragraph 74 and the latter in paragraph 75, and that paragraph 74 is further divided into two still more specialized groups, viz: those medicinal preparations of which when imported the alcohol is a component part, and those in whose preparation alcohol is used but which *(semble)* do not when imported contain it. Hence we are no longer concerned with the comparison between a mere provision for "medicinal preparations" and one for chemical salts, but with that between an extremely specialized sub-class of alcoholic medicinal preparations, involving the employment of alcohol in their production, but not containing any, and one for chemical salts. As to definiteness, it seems to us that there can be no question but that the former is incomparably superior.

Repeated decisions of this court establish the doctrine that when a definite and an indefinite provision both cover the same product, the latter must yield to the former.

Isaacs vs. Jonas, 148 U. S. 648.
Bogle vs. Magone, 152 U. S. 623.

Paragraph 74 is more specific than paragraph 76, in the sense of being far narrower.

The certificate recites that "the number of chemical salts is excessively large", but states that there was no adequate testimony as to the relative number of these and of medicinal preparations in the preparation of which alcohol is used. Standard works of reference cannot well be introduced as testimony, but we believe that courts recognize the propriety of resort to them by counsel in argument, or by the judges themselves for the advisement of their minds. We know of no authoritative index or enumeration of chemical salts,

but their number, and that of alcoholic medicinal preparations also, may readily be approximated as follows: It is common knowledge that a salt is produced by the union of an acid and a base, and that as a rule every acid will combine with every base. There are exceptions, but they are more than equalized by the fact that a polyvalent base will form several different salts in combination with differing atomic proportions of the same acid, the like being true of polybasic acids. The most recent standard reference works on chemistry, Dammer's Inorganic Chemistry* and Beilstein's Organic Chemistry§, enumerate about 1200 bases and about 3800 acids. A mere multiplication hence demonstrates that there are approximately 4,500,000 chemical salts. For medicinal substances the most authoritative reference is the United States Dispensatory, wherein both crude or natural and highly prepared products are catalogued. The latest edition of that work mentions about 21,000 such substances. Of these, very many are not preparations, but natural products, and of the preparations, a great proportion —probably a great majority—are prepared without the use of alcohol. Thus we find that the relevant part of paragraph 74 describes a class numbering far less than 20,000 articles, while the relevant part of paragraph 76 describes a class with over 4,000,000 members. A mere disproportion in the number of members covered by either of two provisions of the law might not in itself be a controlling factor in determining their order of precedence, but a disproportion so vast as is here shown, surely creates a conclusive preference in favor of the narrower provision.

Solomon vs. Arthur, 102 U. S. 208.
Hartranft vs. Meyer, 135 U. S. 237.
Seeberger vs. Cahn, 137 U. S. 95.

* Dr. O. Dammer. *Handbuch der anorganischen Chemie*,—1894. 3 vols.

§ Beilstein. *Organischen Chemie*. 4 volumes, now in publication.

Paragraph 74 is couched in language of commercial designation, while paragraph 76 is not.

As set forth in the certificate, the product named "is a medicinal preparation and is known as such by the physician, the chemist, the druggist and in commerce, and was so known definitely, generally and uniformly at and prior to the enactment of the tariff law of 1890." From

U. S. vs. 200 Chests of Tea, 9 Wheat. 430

to

De Jonge vs Magone 159 U. S. 562,

this court has in innumerable cases asserted and reasserted the controlling force of the rule as to commercial designations. As stated by Mr. Justice BRADLEY in

Robertson vs Salomon, 130 U. S. 412,

"it is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws".

Muriate of cocaine is shown to be in the fullest extent within this rule, the language of the certificate bringing it precisely within the latest qualifying decisions of this court, such as Berbecker vs. Robertson, 152 U. S. 373.

With chemical salts the case is entirely different. That, says the certificate "is a generic term, and includes a commercial class of articles known * * * as covering among others muriate of cocaine". It is no compliance with the rule as to commercial designation, to show that a given article is a member of a commercial class not designated for duty in the tariff, but which is *included* within a generic term found in the tariff. Trade designations, specific or general, employed in the law, and shown by testimony to be coincidently employed in trade, are what have been the subject of the many decisions upon this point. Thus upon the certificate, the designation, "medicinal preparations", which is a trade term covering and in-

cluding muriate of cocaine, must be weighed against the generic term "chemical salts", which in fact also includes and covers the said body, but which is not the designation employed by traders either for that body or for any group of which it is a member. Indeed it would be a strange phenomenon if a term which equally well describes over 4,000,000 products should have been found sufficiently definite and descriptive to be employed among merchants for any of their purposes of subdivision.

The course of legislation.

A study of the successive tariff laws relative to chemical compounds and salts and to medicinal preparations, serves to enforce the conclusions so clearly derivable from the act of 1890 viewed alone. Neither the medicinal group nor the chemical group is a new subject of tariff reference. Without delving too far into the past, it may be stated that the Revised Statutes and all later tariff enactments have contained provisions for each of these groups. But the provisions prior to 1890 had been, as to medicinal preparations, less specific and orderly than in that law. In the Revised Statutes, Section 2504, there was one provision (p. 478) for all medicinal preparations other than proprietary ones, and another (p. 480) for all proprietary medicines, while salts and preparations of salts were elsewhere enumerated in the act (p. 481). In the act of 1883 (22 Stat. at L. 494–95), the medicinal preparations were divided into alcoholic, non-alcoholic and proprietary, but were enumerated in three separate and not consecutive paragraphs. The provision for chemical compounds and salts stood substantially as in the act of 1890. In the last mentioned act, with which we are concerned in the present case, these old provisions as to medicines have been brought together in two consecutive paragraphs, the distinction between

proprietary and non-proprietary ones has been done away with (a natural consequence of the abolition of internal revenue tax on proprietary medicines), some adjustment of rates has been made, and the following new language added to the provision for medicinal preparations of which alcohol is a component part, viz: "or in the preparation of which alcohol is used". The provision as to chemical compounds and salts remains substantially unchanged, although the words "by whatever name known", found in the act of 1883, have been stricken out. Thus the only new ground taken by this statute is the one so precisely occupied by muriate of cocaine, viz: the alternative provision for preparations prepared with the aid of alcohol as distinguished from those which, as completed, still contain alcohol. There would seem to be not the least room for doubt, under this law, that the use of alcohol in preparing any medicinal preparation, appropriated the resultant product to paragraph 74, of which this new legislation is a part. It would appear that Congress had acted upon a deliberate intention to reach out and take hold of products like muriate of cocaine, for every medicinal preparation which as imported contained alcohol, was amply provided for without the new language referred to. A substantial change in the law will not be presumed to have been made without intending a substantial change in the operation of the law.

Liebenroth vs. Robertson, 144 U. S. 35.
Grace vs. Collector, 79 Fed. Rep. 315 (C. C. A.)

Even the words "in the preparation of which" seem to have been carefully chosen to apply to muriate of cocaine and like products, for it is precisely in their "preparation" rather than in their production or manufacture, that the alcohol is used, the certificate reciting that "it is necessarily used as a solvent", and its purpose being to refine and purify the product

in order to fit it for the necessary precision of medicinal use. On the other hand, to sustain the contention that paragraph 76 takes precedence of paragraph 74 as to products like muriate of cocaine, would not improbably deprive the new provision in the act of 1890 of all operation, leaving it absolutely null and void. Probably no medicinal preparation exists, in whose preparation alcohol is used, which is not a chemical compound or salt. Unquestionably they are usually if not invariably such. It seems to us repugnant, not only to the established doctrines of interpretation, but to the most ordinary principles of common sense, to adopt a construction which would wholly or largely nullify a carefully drawn new provision of law, enacted in 1890, in favor of a paragraph simply re-enacted from the law of 1883, and far less careful and specific in its language and scope.

Contemporaneous construction.

The construction of former laws, and even the law of 1890, by executive officials, was long and unchangingly in accordance with the foregoing contention.

Medicinal preparations both proprietary and non-proprietary, both alcoholic and non-alcoholic, had always prior to 1890 been assessed under the several provisions for such preparations to which we have referred, and upon protests contending that they should be charged with duty either as salts, or acids, or chemical compounds, or preparations of salts, or even under provisions which designated their precise substance, the Treasury and the courts had repeatedly sustained the classifications thus made.

In Ferguson vs. Arthur, 117 U. S. 482, this court ruled that Henry's calcined magnesia, which consisted of carbonate of magnesia specially prepared and put

up for medicinal use, was properly dutiable as a proprietary medicinal preparation, notwithstanding that there was an express provision in the act for carbonate of magnesia.

The decisions by the Treasury department are so numerous that we quote only a few of the clearest in this place, and have enumerated them serially in appendix A at the end of our brief. We refer to none prior to 1874, not because there were none,—they are continuous from an indefinitely early period,—but because we have not deemed it necessary to quote from the laws prior to the Revised Statutes.

In S. 2867 (June 19, 1876), malt extract, put up and offered as having curative properties, was held dutiable as a medicinal preparation and not as beer, although malt extract not offered as a curative had in a previous decision been held to be beer. Beer was denominatively provided for in the act.

In S. 3080 (Jan. 18, 1877), cigarettes having medicinal characteristics were held dutiable as medicinal preparations, despite the specific provision for "cigarettes of all kinds" in the law (R. S. p. 469).

In S. 3395 (Oct. 28, 1877), salicylate of sodium, a chemical compound and prepared chemical salt, was held dutiable as a medicinal preparation because "used particularly as a medicine", and to be thereby excluded from the provision for "preparations of salts" in that act.

In S. 4011 (May 15, 1879), and S. 4117 (July 29, 1879), the same doctrine was applied to sulphate of cinchonidia and to bicarbonate of potash, both well known chemical compounds and salts.

These decisions construed the provisions of the Revised Statutes, but the same view of the law continued under the act of 1883, whose provisions, both for medicinal preparations and for chemical compounds and salts, were the same as those of 1890, with the important exception of the new provision in the

latter act, covering with the alcoholic medicinals those in whose preparation alcohol was used.

In S. 8504 (Oct. 27, 1887), citrate of iron and quinine, which as its name shows was a chemical salt, was held dutiable as a medicinal preparation, and not under the provision for chemical compounds or salts by whatever name known, in the law of 1883.

Not only under these previous acts, but as stated, under the act of 1890 itself, the same attitude was maintained by the Treasury department and by the board of United States general appraisers, created by the act of June 10, 1890 (26 Stat. at L. 131) to consider and determine issues of this character.

In S. 11194 (May, 1891), acetanilid, a salt produced by combining aniline oil and acetic acid, was upon protest held dutiable as a medicinal preparation non-alcoholic, and not as a chemical compound or salt.

In S. 11572 (July 13, 1891), atropine sulphate, an alkoloidal medicinal salt, containing no alcohol but in whose preparation alcohol was necessarily used as a solvent, was held dutiable by the general appraisers at 50 cents per pound under paragraph 74. The Treasury acquiesced in this decision, which sustained the importer's protest.

In S. 14805 (Feb. 19, 1894), "Brown's Chlorodyne," a proprietary, alcoholic, medicinal preparation, was held dutiable under paragraph 74. In this case, as the language of the decision shows, the appraiser had made a double return, reporting the article to the collector both as a medicinal alcoholic preparation and as a chemical compound, and the collector had chosen the latter as the description to follow in liquidating the duty. The general appraisers disposed of the question by stating—"the Board has invariably held, and is still of the opinion, that enumeration under paragraph 74 is more specific than under paragraph 76."

Thus until 1894, and within a few months of the passage of the new tariff act, which took effect on

August 28th of that year, the construction put upon these paragraphs had been absolutely steady and uniform, by both judges and executive officials, for at least twenty years.

A uniform and long continued interpretation of a course of statutes by those charged with their enforcement, is of almost conclusive weight in resolving any uncertainty as to the proper interpretation.

Robertson vs. Downing, 127 U. S., 607.
Merritt vs. Cameron, 137 U. S., 542.
Heath vs. Wallace, 138 U. S., 573.
U. S. vs. Ducas, 78 Fed. Rep., 339.

And where Congress re-enacts, in language substantially similar, a provision of earlier laws *in pari materia*, the meaning of the new law must be considered to be the same as that which had been put upon the old in practice.

Hedden vs. Robertson, 151 U. S., 520.

It is true that the act of 1890 departed in the particular we have pointed out, from the language of earlier acts. But since the change unquestionably strengthened paragraph 74 in its application to muriate of cocaine, it could not detract from the weight of the rules to which we refer.

To sum up on the question sent here for instructions by the Circuit Court of Appeals:

Paragraphs 74 and 76 both questionably *include* muriate of cocaine.

Paragraph 76 includes it with 4,500,000 other bodies, and specifies no characteristic of it or any of them, while paragraph 74 includes it much less than 20,000 others, and specifies many and vital characteristics common to them all, viz., intrinsic character, means of production and use.

The words used in Paragraph 76 are generic, while the words used in paragraph 74 are an apt commercial designation of a class of articles of which muriate of cocaine is a member.

Paragraph 76 is old law re-enacted without substantial change, while paragraph 74, in its relevant portion, is a provision newly added to the law, and added apparently for the sole purpose of settling the status of such products as muriate of cocaine.

Executive and judicial construction had relegated medicinal salts, under the former laws *in pari materia*, to the much less definitely worded provisions in those laws for medicinal preparations, and had excluded them from provisions substantially similarly worded in such former laws for chemical salts.

II

The judicial decisions in other cases under the act of 1890, as to medicinal preparations, chemical compounds, salts, etc.

Why the judges of the circuit court of appeals have sent a certificate to this court upon the questions herein involved, it is neither the duty nor the prerogative of counsel to explain. But in the absence of any facts or conditions save those set forth in the certificate itself, and discussed in the first part of this brief, we conceive that this court might well be surprised, not alone at the submission to it of questions so easily answered, but with the attitude of the collector of customs in exacting duty at the rate complained of in this case, and of the general appraisers and the circuit court in sustaining such exaction. So far as expla-

nation exists, we think it must be looked for in the several decisions wherein different federal courts have discussed and applied the provisions of the law of 1890. These cases are the following :

Appeal of Battle & Co., 50 Fed Rep. 492.
The same (Circuit Court of Appeals), 12 U. S. Appeals 11.
In re Hirzel, 53 Fed. Rep. 1006.
The same (Circuit Court of Appeals), 20 U. S. Appeals 170.
In re Mallinckrodt Chemical Works, 66 Fed. Rep. 746.

Examination will show that none of these but the last conflicts in the slightest degree with the construction for which we contend, and that the last, a decision by the U. S. circuit court in the eighth circuit, is the one which, practically, we are here to reverse. But these decisions (except the last) have been misunderstood and misapplied by the Treasury officials, including the board of appraisers, and while we do not think that the circuit court in New York which decided the present case misunderstood them, Judge COXE stated that he felt constrained, as a matter of interjudicial comity, to follow the decision in the Mallinckrodt case, since it had been rendered by a court of coördinate jurisdiction. To briefly analyze the cases above cited :

The case of Battle & Co. raised the question of duty on chloral hydrate, which had been assessed at 50 cents per pound under paragraph 74, the importer appealing from such exaction, and claiming the right to enter at 25 per cent. *ad valorem*. The opinion in the circuit court, which was affirmed in very few words on appeal, sustained the contention of the importer, mainly upon the ground that as the evidence proved, there were several processes equally available in producing chloral hydrate, of which only one involved any employment of alcohol. The completed product con-

tained no alcohol, and gave no indication whether or not it had been made by the alcohol process. The court very justly ruled that duty at 50 cents per pound could only be sustained upon such a body, on the *hypothesis* that it had been made with alcohol, and that if absolute inquiry were made upon each importation, the result would be that different shipments of the same product would pay different rates of duty, a result repugnant to both law and common sense.

Thus the Battle case was absolutely without force as affecting the question of duty on muriate of cocaine, which, as the certificate shows, can be made by but one process, viz: that involving the use of alcohol. The other reasons which influenced the courts in the Battle case we need not discuss, further than to comment, in passing, upon the suggestion of the circuit judge in that case, to the effect that since chloral hydrate was usually diluted or admixed before its employment, it was doubtful whether it was "in a strictly legal or dictionary sense" a medicinal preparation. This language shows that the remark was merely *obiter*, not a conclusion from any evidence in the record. In the state of the record as well as of the certificate in the present case, this remark can have no application, for the testimony here proves conclusively, and the circuit court of appeals has certified, that muriate of cocaine is a medicinal preparation in every sense of the word.

The case in re Hirzel was concerned with the duty on crude cocaine, an article as different from muriate of cocaine as sodium is from table salt. Cocaine is an alkaloid, the powerful essential principle of the coca leaf, unstable in potential strength and unfit for medicinal use. The importer protested against its classification as an alkaloid, under paragraph 76, contending that it was dutiable as a medicinal preparation, and this protest and contention the courts very properly overruled. In the circuit, the decision proceeded chiefly upon the following reasoning: alkaloids, which are provided for by name in paragraph

76, are a very narrow class of articles, none of which are complete medicinal preparations, but all of which have potential medicinal virtue and are the substances from which medicinal preparations are manufactured. Whether any such body could be properly described as a medicinal preparation was doubtful, but if the description was applicable to any alkaloid it was equally so to them all. Thus to hold that they were dutiable as medicinal preparations would deprive the word "alkaloid" in paragraph 76 of all force and effect,—a result repugnant to the principles of statutory construction.

In the circuit court of appeals, while this doctrine was not repudiated, the decision was affirmed upon the ground that crude cocaine, not being practically fit for medicinal use, is not properly a medicinal preparation at all, the court saying: "Its common use in its impure condition is for the manufacture of the pure or advanced forms in which cocaine becomes known as a medicinal article, and which may properly be called 'medicinal preparations'".

No more than the Battle case does this of Hirzel influence the issue now under discussion. Alkaloids, the narrow group which would have been left without operation by sustaining the contention of Hirzel, included cocaine but distinctly excludes muriate of cocaine. Salts, the term which includes muriate of cocaine, is an immensely wide one, and not one in a thousand of its members is in any sense medicinal. Crude cocaine was finally, and properly, held not to be a medicinal preparation at all. Muriate of cocaine is a type of those *pure or advanced forms* which the court in the Hirzel case referred to as products *which may properly be called medicinal preparations*. Thus in the Battle and in the Hirzel cases, two products which had no right to enter paragraph 74 at all, were excluded from classification under that paragraph. In neither of the cases, in the upper or the lower court, was any such doctrine asserted, or any such contention apparently made by counsel, as that upon a conflict between the

two paragraphs, 76 should have precedence. Up to that time, no such conception of the law seems to have entered the mind of any court, counsel or executive official.

No other decision has to our knowledge been rendered by the courts upon the relevant provisions of the act of 1890, except that in the Mallinckrodt case, which as already stated, we are here to reverse. But the Treasury officials apparently made a wrong application of the decisions we have discussed, for in March, 1893 (S. 13849), collectors were ordered to assess duty upon muriate of cocaine under paragraph 76, and such order was explained as being issued in consequence of the circuit court decision in the Hirzel case. A reading of S. 13849, which we have attached to our brief as appendix B, will show what an entire misconception of the Hirzel decision was involved in the position of the Treasury, as well as an entire misconstruction of the different paragraphs of the tariff law. Upon the change in practice which followed at the custom house, protests were at once lodged by importers, who felt aggrieved that a construction which had prevailed for four years under the law in force and for time out of mind under previous laws, should be suddenly overturned, not in pursuance of, but in conflict with, the decisions of the courts. These protests were sustained by the general appraisers as they came up for decision, until the spring of 1894, when their decision on Mallinckrodt's case was appealed to court by the Treasury, resulting in the reversal of the board, reported in 66 Fed. Rep., already cited. Thereafter, the general appraisers, not at all changed in their view, but feeling compelled to follow the rulings of the courts, (see S. 15114*) re-

* "In G. A. 886, the board found that it [muriate of cocaine] was a medicinal preparation in the preparation of which alcohol is used, and held that enumeration under paragraph 74 is more specific than the provision in paragraph 76 for alkaloids, salts, chemical compounds, etc. This view, which we still hold but no longer maintain, is, however, in conflict with several recent judicial decisions. And as we are under the necessity of following the opinions of appellate tribunals, our former rulings on the subject must be reversed."

versed their own attitude and decided the remaining protests against the importers at New York and elsewhere.

The decision in the Mallinckrodt case held that paragraph 76 provided more aptly for muriate of cocaine than paragraph 74. It is unsound both in reason and in law, and should be overruled in the present case. The entire opinion is permeated with errors, among which it will doubtless suffice to point out the following :

1. A complete confusion of *alkaloids* and *salts*, which the court appears to think are practically the same article or class of articles. The decision makes reference to "alkaloid salts", and purports to find, in the language employed in paragraph 76, a congressional intention to impose duty at 25 per cent "on all of a specific class of organic substances or compounds known as 'alkaloids' or 'alkaloid salts'". As congress has nowhere employed the term "alkaloid salts", and as such term is not known among chemists or merchants, it seems to us that this reasoning of the court is absolutely fallacious.

2. The dictum that the significance of the words in paragraph 76 is in the judgment of the court more precise than the phrase "medicinal preparations in the making of which alcohol is used".

It may be observed that the court reached this conclusion in view of the word "alkaloids", and then proceeded to apply it in favor of the hypothetical phrase "alkaloid salts". Observing that alkalies and alkaloids are named together in paragraph 76, and that, as shown by the certificate in the present case "salts are either alkaloidal or alkaline, produced by combination of either alkaloids or alkalies with acids", it is evident that no construction can be maintained in favor of alkaloidal salts (the only existing things

suggested by the imaginary phrase "alkaloid salts") which must not equally apply to "alkaline salts." And if both sorts are to be brought within the operation of the words "alkaloids" and "alkalies" the further provision for "salts" in the act is absolutely nugatory. Thus it is unwarrantable, both textually and logically, to apply in favor of any kind of *salts* the reasoning which might properly be applied to *alkalies* and *alkaloids*.

3. That because crude cocaine had been held dutiable at 25 per cent in the Hirzel case, it would be wrong to allow the completed medicinal salt of it to enter at a less rate of duty. To this we answer

(1) That the language of the law being clear and unambiguous, there is no room or warrant for construction, for this court has held that construction has no proper scope in laws whose meanings are clear.

Ruggles vs. People of Illinois, 108 U. S. 536
and see Rice *et al.* vs. U. S. 10 U. S. App 670
U. S. vs. Downing, 14 U. S. App 434-438

(2) That to adjust tariff laws to the supposed requirements of political economy, especially at the expense of violence to their language, is not construction but legislation.

Merritt vs. Welsh, 104 U. S. 694.

(3) That in the present instance, any attempt so to adjust the law would be hopeless. Surely one rule cannot be made for the alcoholic medicinal, cocaine muriate, on which 50 cents per pound happened,—upon the price in 1894,—to be less than 25 per cent, and another rule for the alcoholic medicinal, terpene hydrate, on which at the same time 25 per cent happened to be less than 50 cents per pound. On many, perhaps most, of the products within the operation of paragraph 74, 50 cents per pound was the higher rate. On some, indistinguishable in kind from the others, it

was lower. In the act next following (28 Stat. at L. 511) congress legislated so as to effect a discrimination in this regard, by providing, after re-enacting the language of paragraph 74 from the act of 1890, that no such preparation should pay less than 25 per cent. Surely this proviso of 1894 cannot legally be surcharged on the act of four years earlier by judicial interpretation. Within the act of 1890 itself there are the most diverse rates imposed on different medicinal preparations, such as (paragraph 22) iodoform $1.00 per pound; (paragraph 24) medicinal carbonate of magnesia three cents per pound; (paragraph 25) salts of morphia, 50 cents per ounce; (paragraph 35) aqueous extract of opium &c. 20% *ad valorem*. It would be an extensive task upon which a court would enter if it were to undertake to level out the rates which congress has seen fit to impose on different products of a like general character, or to adjust equitably those on differing sorts of goods, and we think it is fully established in the cases above cited, that it would be an illegitimate task as well. At the very time when the courts decided that the collector had been right in excluding crude cocaine from paragraph 74, he was, and for years had been, passing muriate of cocaine under that paragraph, recognizing it as an alcoholic medicinal preparation.

We submit that each one of these three propositions of the circuit court in the Mallinckrodt case is an error which alone would require the decision to be overruled. It is the only case which it is necessary for this court to call into question in order to decide the case now before it in harmony with our contentions. It controlled the action of the circuit court judge before whom the present case was argued. It was not rendered by a court whose rulings can in any degree control the action of this court; it was bad law and should be overturned.

Is it unreasonable to suppose that the circuit court of appeals which sent this certificate here, and which

demonstrated its clear view of the controlling facts in the case by the language of its certificate, sent it here because it was thought desirable that the inevitable decision in favor of paragraph 74, should, in view of the several decisions in different circuits, more or less in conflict with each other, be rendered by the Supreme Court of the United States?

The circuit court of appeals should be instructed that muriate of cocaine was [redacted] dutiable, under the act of 1890, under paragraph 74 of that act and not elsewhere therein.

ALBERT COMSTOCK,
Of Counsel.

COMSTOCK & BROWN,
Attorneys for Appellants.

APPENDIX A.

Treasury rulings as to the force of provisions for medicinal preparations.

S 2078. January 23, 1875. "The Department * * concurs with you in the opinion that, as the article in question [adhesive plaster in rolls] is a preparation intended and used for medicinal purposes, it is dutiable as a medicinal preparation not otherwise provided for.

S 2603. January 17, 1896. "It appears, * * that * * quinoiline, or 'chinoidine', is a precipitated extract of Peruvian bark; * * used as a substitute for quinine * *, and that it enters largely into the composition of most of the popular remedies * * it is dutiable as a medicinal preparation not otherwise provided for."

S 2867. June 19, 1876. "It appears * * that the malt extract in question [Johann Hoff's] * * is recommended by competent authority as of special advantage in diseases of the chest and stomach * * but to be always used under the direction of a physician * * the merchandise being in fact a 'medicinal preparation or composition, recommended * * as a proprietary medicine' * *, it is not covered by decision of July 10, 1875 (SS 2338) * * is dutiable * *, under the provision in Schedule M for 'proprietary medicine' ".

S 3080, January 18, 1877. "It appears * * that the cigarettes in question are 'proprietary medicines * * * prepared according to some private formula, or secret art.' duty was properly exacted under the provision for 'proprietary medicines.' "

S 3395. October 20, 1877. "* * the article in question [Salicylate of Sodium] is used principally as a medicine * * it was therefore classified as subject to duty * *, under the provision in Schedule M, R. S. for 'medicinal preparations not otherwise provided for.' The Department is of opinion that such classification was correct".

S 3528. April 9, 1878. "You are informed that the Department regards the article [Braunscheid oil] as a proprietary medicine, dutiable."

S 4011. May 15, 1879. "It appears, * * that the article, [Sulphate of cinchonidia] although a chemical salt, is a well-known medicinal preparation, which is used as a substitute for * * sulphate of quinine, and * * that it is dutiable * * under the provisions in schedule M, (Heyl, 1332,) for 'medicinal preparations not otherwise provided for.'"

S 4117. July 29, 1879. * * the members of the board [U. S. Gen'l App.] are unanimously of the opinion that the bicarbonate of potash, * * is used almost exclusively as a medicinal preparation, and that it is almost invariably classified as such, * * * * in the opinion of the board, very little, if any, of such merchandise is imported and admitted * * now under any other than the above classification.

S 4161. August 26, 1879. A decision substantially identical with S. 4011.

"It appears that the article in question [Sulphate of cinchonidia] is one of the natural alkaloids of cinchona bark, and although a chemical salt, is used exclusively as a medical preparation, and was classified for duty under the provision in Schedule M. Revised Statutes, for 'Medicinal preparations not otherwise provided for.'"

S 4531. May 17, 1880. "In regard to the cotton cloth, the appraiser reports that it is known as 'anti-septic gauze' * * specially prepared with carbolic acid for surgical * * dressings * * The Department is of the opinion that the cloth was properly classified as a 'medicinal preparation' in accordance with the principle set forth in decision of September 27, 1866, or adhesive plasters."

S 4575. June 14, 1880. "With regard to the first mentioned article [Salts of tartar] the Department concurs with the appraiser at your port in the opinion that it should be classified as a medicinal preparation not otherwise provided for."

S 4693. November 4, 1880. "In the opinion of the Department, such articles [Robinson's corn-solvent pencils] come within the category of "proprietary medicines," which, by Schedule M, (Heyl, 1397,) are dutiable at the rate * *."

S 4701. November 16, 1880. "After due investigation * * and an inspection of a sample, it is ascertained that the article [Chian Turpentine] is an oleoresin, which is medicinally pure and which is used as a specific in cases of cancer, * * In the opinion of the Department the article is dutiable * * under the provision * * for 'medicinal preparations not otherwise provided for.'"

S 4809. March 28, 1881. "the article in question [Salicylate soude] is not the ordinary salicylate of soda, * * but is a proprietary medicine * * *"

S 4834. April 19, 1881. "It is understood * * that the said article [Johann Hoff's malt extract imported in casks] * * is identical with the 'Johann Hoff's malt-extract' * * held to be dutiable * * as a 'proprietary medicine' * *

the Department, * * decides that the said article, * * is dutiable * * as a 'proprietary medicine.' The ruling of * * (S 2338,) on 'malt-extract' in casks, was not intended to cover a proprietary medicinal article of this character, * *

In a recent case at Phila, the Department decided that the Johann Hoff's Malt-extract, imported in bottle not stamped and labelled, was dutiable as aforesaid."

S 4968. August 20, 1881. "It appears that it has been your practice to treat the last two [articles, Bishop's granular effervescent pepsin, bismuth, and strychnia, and Bishop's granular effervescent citrate of caffeine] as dutiable at 50 per cent. *ad valorem.*

Reports obtained from experts in the appraisers' office * *, satisfy the Department that the last two are dutiable * * under the provision * * for proprietary medicines, &c."

S 4987. August 26, 1881. "It is understood * * that the appeal only relates to catgut ligatures, which were classified for duty at the rate of 40 per cent ad valorem, * *, rubber inhalers, * * which were classified at a duty of 35 per cent ad valorem, * * carbollized, medicated, and styptic cottons, which were classified at a duty of 40 per cent, ad valorem, * *

In the opinion of the Department, all of the said articles are liable to duty at the rate of 40 per cent. ad valorem, * *, under the provision for 'medicinal preparations not otherwise provided for.'"

S 8503. October 26, 1887. "It appears that said importations consisted of * * Batley's 'Liquor Opii Sedativus' * * 'Herring's Extract Cannabis Ind.,' and * * Batley's 'Liquor Secali Cornuti.'

Upon an examination of the three samples * * the appraiser * * reports * * that Batley's 'Liquor Opii Sedativus' is treated * * as a proprietary medicine under * * (S 6684) and that the

other two articles * * are, in his opinion, dutiable at * * 25 per cent. ad valorem * * [under the provision for medicinal preparations not specially provided for] Your decision as to the liquid opium * * is hereby affirmed. * * As to the other two * * the Department concurs with the appraiser".

S 9217. January 26, 1889. "Under the Department's decisions * * (S. 7574,) * * (S 8494,) the salt in question [Carlsbad sprudel salt] was properly classified as a proprietary preparation."

S 9715. November 18, 1889. (S. 9217 modified) "After a careful inquiry into the nature of this article [Carlsbad sprudel salt] * * the Department finds that these salts are the natural salts from the sprudel springs at Carlsbad * * The Attorney-General, * * expresses the view that the salt, * * should be entitled to entry as a chemical salt * * In this view the Department concurs, it being of the opinion that a natural salt of this character cannot be considered as a preparation within the meaning of T. I. 99. * * * the Department's decision * * wherein said salts were held to be dutiable as a proprietary preparation, is modified, and said salts are hereby held to be dutiable * * as chemical salts not otherwise provided for. * * This decision must not, however, be applied to artificial Carlsbad salt, which, being a preparation within the meaning of T. I. 99, would be dutiable under that provision * *".

S 11194.—G. A. 553. May 4, 1891. "The merchandise in question is acetanalid, * * Duty was assessed on the article as a chemical compound. * * Acetanalid is known as a medicinal preparation. * * It should, therefore, be classified * * as a medicinal preparation."

S 11572—G. A. 747. July 13, 1891. "The merchandise consists of atropine sulphate and elaterium, which

were assessed for duty as medicinal preparations at 25 per cent., under paragraph 75 N. T. The appellant contends that the atropine sulphate is dutiable at 50 cents a pound, under paragraph 74, as a medicinal preparation in the preparation of which alcohol has been used * *

This importation is from Germany. According to formulas given by standard German authorities, alcohol is the solvent used in the preparation of atropine sulphate. Dr. Bernard Fisher, a celebrated German chemist, certifies that the use of any solvents other than alcohol in this preparation is objectionable. The claim of the importer that atropine sulphate is dutiable under paragraph 74 at 50 cents a pound is therefore sustained."

S. 11973—G. A. 886. September 24, 1891. "The merchandise consists of beberine sulphate, cocaine hydrochlorate, and hyoscamine sulphate, all * * assessed * * as chemical salts * * The appellants claim that the articles are dutiable * * as medicinal preparations * * From the three special reports of the appraiser * * it would appear that the claim * * is well founded In view of the reports * * the Collector stands willing to allow the claim * * But the Naval Officer dissents, for the reason that he is of the opinion that paragraph 75, for chemical compounds and salts, is a more specific enumeration than medicinal preparations mentioned in paragraph 74.

From expert testimony * * we find that the three articles in question are medicinal preparations * * We hold, * * that enumeration as a medicinal preparation is more specific than the provision for chemical salts * *"

S 14805—G. A. 2488. February 19, 1894. "The goods are "Brown's chlorodyne" and "Liqueur de Dr. Laville", which we find to be medicinal proprietary preparations containing alcohol.

While this finding is in accordance with the appraiser's return, he also reported that the articles were 'chemical compounds', and assessment of duty at 25 percent was made under the latter enumeration.

The board has invariably held, and is still of the opinion, that enumeration under paragraph 74 is more specific than under paragraph 76. We sustain the claim that the merchandise is dutiable * * * under paragraph 74, N. T.

This is not in conflict with G. A. 1531, for in that case it was held that crude cocaine is not a medicinal preparation."

APPENDIX B.

S 13849.

TREASURY DEPARTMENT, March 20, 1893.

GENTLEMEN: The Department is in receipt of your letter of the 16th instant in which, calling attention to Department's letter of the 7th instant, instructing the collector of customs at New York to disregard G. A. 886 and to classify muriate of cocaine under the provisions of paragraph 76 of the act of October 1, 1890, you state that muriate of cocaine is a refined article and a medicinal preparation, and is not an alkaloid, while cocaine (whether crude or refined) is an alkaloid, and you therefore request that the Department's instructions above referred to be reconsidered and the collector of customs at New York authorized to admit muriate of cocaine as a medicinal preparation under paragraph 74 of the act of October 1, 1890, in harmony with the decision of the Board of General Appraisers (G. A. 886).

You state that muriate of cocaine is prepared by dissolving crude cocaine (an alkaloid) in alcohol, to which solution hydrochloric acid is added; that the acid combines chemically with the alkaloid, and forms cocaine hydrochlorate, a new product, which is then purified by repeated recrystallization from alcohol.

In reply, I have to inform you that, inasmuch as it appears from your own statement that muriate of cocaine is a salt of an alkaloid, the Department adheres to the opinion that this article is more specifically provided for in paragragh 76 of the act of October 1, 1890, which includes salts of alkalies, alkaloids, etc., than in paragraph 74, cited by you, which provides in general terms for medicinal prepara-

tions, such view being in harmony with the recent decision of the United States circuit court for the southern district of New York in the case of Hirzel, Feltman & Co., wherein it is held that the provision in paragraph 76 for alkaloids is more specific than that in paragraph 74 for medicinal preparations.

Your request for a reconsideration is therefore denied.

Respectfully yours,

(2545*g*.) O. L. SPAULDING,
Acting Secretary.

No. 120.

Brf. of Atty. Gen'l (Hoyt) for Appellees.

Filed Apr. 16, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

FREDERICK W. FINK AND ALBERT PLAUT, trading as Lehn & Fink, appellants,
v.
THE UNITED STATES.
} No. 120.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

FREDERICK W. FINK AND ALBERT PLAUT, trading as Lehn & Fink, appellants,
v.
THE UNITED STATES. } No. 120.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case comes from the circuit court of appeals for the second circuit, with a request for instructions from this court upon the following questions:

1. Is muriate of cocaine properly dutiable under paragraph 74 of the tariff act of October 1, 1890?

2. Is muriate of cocaine properly dutiable under paragraph 76 of the tariff act of October 1, 1890?

The collector, and afterwards the circuit court, held affirmatively as to the latter question, thus deciding that muriate of cocaine is to be regarded as included in—

> Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils,

> rendered oils, and all combinations of the foregoing, and all chemical compounds and salts not specially provided for in this act. (Par. 76, act of October 1, 1890, 26 Stat., 570.)

and not under—

> All medical preparations, including medicinal proprietary preparations, of which alcohol is a component part, or in the preparation of which alcohol is used, not specially provided for in this act. (Par. 74, *ibid.*)

The circuit court of appeals reports that muriate of cocaine is an alkaloidal salt and is a chemical salt produced by combination of the alkaloid cocaine and muriatic acid; that alcohol is necessarily used as a solvent in preparing it; that muriate of cocaine is a medicinal preparation and known as such by the physician, the chemist, the druggist, and in commerce; that the term "salts" or "chemical salts" is a generic name known by chemists, pharmacists, and druggists as covering, among others, muriate of cocaine; that "medicinal preparation" has no peculiar commercial meaning, but signifies generally a substance used solely in medicine and prepared for the use of the apothecary or physician to be administered as a remedy in disease; that the number of chemical salts is very large and a very small proportion is used in medicine; and that there is no adequate testimony in the case in regard to the relative number of imported medicinal preparations in the preparation of which alcohol is used, and of imported chemical salts.

It may be stated here that an examination of the dictionary authorities as to the terms "preparations" and "salts" throws no additional light upon and adds no

force to the distinctions of the certificate as to the meaning and use of the terms "medicinal preparations" and "chemical salts."

The Government contends that the decision of the circuit court was correct.

BRIEF OF ARGUMENT.

I.

The meaning of the language involved, as drawn from former tariff acts, shows that muriate of cocaine properly falls under paragraph 76.

It is clear from a reference to the tariff act superseded by that of 1890 that "medicinal preparations, including medicinal proprietary preparations" was an expression less broad than medicines. In that law these preparations were all subdivided under other terms—those

> known as cerates, conserves, decoctions, emulsions, extracts, solid or fluid; infusions, juices, liniments, lozenges, mixtures, mucilages, ointments, oleo-resins, pills, plasters, powders, resins, suppositories, sirups, vinegars, and waters * * * [proprietary] cosmetics, pills, powders, troches or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils, or preparations or compositions recommended to the public as proprietary articles, or prepared according to some private formula as remedies or specifics * * * medicinal preparations known as essences, ethers, extracts, mixtures, spirits, tinctures, and medicated wines of which alcohol is a component part. (Pars., 93, 99, 118, of the tariff act of 1883, 22 Stat., 494, 495.)

Without undertaking to point out the precise limitations in the mind of Congress to the phrase "medicinal preparations," it is very clear that the words "known as" before cerates, emulsions, extracts, etc., and the mention of "proprietary preparations, to wit, cosmetics, pills, powders," etc., indicate that "medicinal preparations" was not equivalent to medicines; that in the intent of Congress every medicine, or substance prepared for use as a medicine, was not one of the "medicinal preparations" intended by this language.

There is doubtless no medicine that does not require to be prepared for use as such in some sense of the word "prepared," and if every medicine was intended, it was superfluous to use the word "preparations."

If, then, "medicinal preparations" was not intended to embrace all medicines, or, what is the same thing, all substances prepared for use as medicines, and if, moreover, "chemical salts" were excluded from "medicinal preparations" by an enumeration of all such preparations, and by being provided for under another paragraph (par. 92, act of 1883, 22 Stat., 494) containing substantially the language of paragraph 76, then it follows that "chemical salts," whether medicines or not, were all intended to be embraced in this language and dutiable as such salts.

But the language of the act of 1883 was transferred almost without change to paragraph 76, and the phrase "medicinal preparations," with an omission of the enumeration of articles for the sake of brevity, but without any indication of a new meaning for the phrase, was transferred to paragraph 74. We thus have an indication

from the act of 1883 that Congress used the phrase "chemical salts" in paragraph 76 to mean all chemical salts, whether used as medicines or not, and did not use the phrase "medicinal preparations" in a sense that would include what was merely a chemical salt, though used as a medicine.

Reiche v. *Smythe* (13 Wall., 162–164):

> And it is fair to presume, in case a special meaning were attached to certain words in a prior tariff act, that Congress intended they should have the same signification when used in a subsequent act in relation to the same subject matter. * * * Congress having, therefore, defined the word in one act so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject when there is no language used indicating an intention to produce such a result? Both acts are *in pari materia*, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act in the absence of anything to show a contrary intention.

"Medicinal preparations," in the act of 1890, means, therefore, preparations *ejusdem generis* with the medicinal preparations specified in the act of 1883.

The term "medicinal preparations" has been differentiated from drugs and medicines, not only in the act of 1883, but since it first appeared in tariff laws. (Act of July 30, 1846, Schedules C, D, and E, 9 Stat., 42; act of July 14, 1862, sec. 5, 12 Stat., 543; Rev. Stat., sec. 2504, pp. 475, 478, 480.) These provisions define and classify medicinal preparations in the sense contended for

in this argument. The provisions of the Revised Statutes as to the examination of drugs bear out our contentions. (Secs. 2933–2935.) The term has signified, generally, a composition like a fluid extract or tincture or an ointment prepared for use by mixing or compounding—that is, by other than mere chemical process—and yet differing from the materials—that is, the medicines or drugs—out of which it was made. It included plasters and powders and proprietary articles of various sorts prepared and used for medicinal purposes as remedies or specifics for any disease. It will therefore be seen that the range of the term is wide and embraces very diverse things, in all of which, however, there is the element of preparation by mixing, compounding, or constructing rather than of production by chemical process.

If the distinction by Congress between the species "medicinal preparations" of the genus "drugs" lies in the fact that the "preparation" is something ready prepared for use by customers without any manipulation by the druggist, then muriate of cocaine does not fall under the head of such a "preparation," as its most frequent transfer to the customer is after it is "reduced to a powder by means of a mortar and pestle, or diluted in water or admixed with inert or neutral matter." (Ctf., p. 2). It is therefore, if that be the distinction, a medicine merely and not a "medicinal preparation."

It seems unnecessary, in view of all this, to confound what Congress put asunder by ignoring the Congressional use long attached to the words of paragraphs 74 and 76 and inquiring whether one section as well as the other did not cover muriate of cocaine, and, if so, which applied

to it the more specific language. But that seems to have been the course pursued in the lower courts.

II.

Muriate of cocaine is accurately and definitely designated by the term "chemical salts;" it is merely described by the term "medicinal preparations."

If an article is a "medicinal preparation" and a "chemical salt," and the case must turn on whether the class of "medicinal preparations" is something more definite than the class of "chemical salts," it may, perhaps, be difficult to arrive at the intent of Congress to have the article dutiable under the one or the other. But paragraph 74 is confined to "medicinal preparations of which alcohol is a component part, or in the preparation of which alcohol is used." And if it is with great difficulty that what is merely a "chemical salt," useful as a medicine, can be shown to be a "medicinal preparation" within the intent of Congress, a similar difficulty arises when it is attempted to show that alcohol is employed within the intent of Congress.

It has been pointed out in *Appeal of Battle & Co.* (50 Fed. Rep., 402) that what Congress had in mind was "that alcohol was used as an *ingredient*, without being broken up, either as a solvent or to extract and hold in solution the medicinal properties of certain vegetable substances or drugs." This case was affirmed on appeal, the court declaring it had reached the same conclusions as those expressed in the opinion of the lower court (12 U. S. App., 111). Of what concern it could be to Congress that in the preparation of the salt abroad

alcohol was used, there being no longer any alcohol present, either because it had evaporated and left a salt, or because, as in the Battle Case, it had been "broken up into its constituent elements, and does not reappear in the drug, and can not be extracted therefrom, as it may be when used as a solvent or to treat oils or other fatty substances."

It is true that the court of appeals in the present case says: "In its preparation alcohol is necessarily used as a solvent" (Ctf., p. 1). But this does not require us to understand that the solid crystal imported has any alcohol about it, but is entirely consistent with what is said in the case of *In re Mallinckrodt* (66 Fed. Rep., 746), which is a direct authority in our favor, that alcohol is used to remove impurities from the cocaine. (See also *In re Hirzel*, 53 Fed. Rep., 1006.)

Whether a salt is precipitated in or crystallized by water or alcohol, or the substances of which it is *made* purified by water or any other liquid, in a foreign country, would seem to be of no importance to Congress in laying a duty upon the salt itself. Yet by this slight thread is an article clearly described in paragraph 76 to be transferred to paragraph 74.

We submit that Congress knew that "chemical salts," whatever their use, did not contain alcohol, and that alcohol was not used in the preparation of any of them except possibly as the solvent in which their elements were crystallized or washed; and that, therefore, it did not intend to embrace them in paragraph 74.

Again, paragraph 76 is the later section, and if a conflict or equality exists, with no other means of escape,

must prevail; that is, chemical salts must pay duty as such in disregard of "medicinal preparations" rather than the contrary. Or, if no other means of determining exists, the doubtful must give way to the clear. It is easily disputed that muriate of cocaine is within the meaning of paragraph 74; but no one pretends to deny that it is a "chemical salt." A name such as "salts" is more definite than a description. (*Arthur* v. *Rheims*, 96 U. S., 143; *Robertson* v. *Glendenning*, 132 U. S., 158; *Matheson* v. *United States*, 71 Fed. Rep., 394.)

"Medicinal preparations" is at most a description. As was said about different merchandise in *Solomon* v. *Arthur* (102 U. S., 208, 212): "But are the terms relied on a name for goods; are they not descriptive rather than denominative? * * * The same description is applicable to many other kinds of goods, all having different names. It is not their name; it is merely their description." "Salts," on the other hand, is a designation. Even if a generic term, it is still a designation.

Whether or not the term "chemical compounds" is large and vague, even in the comparatively limited sense in which it is used in trade and science (for in its broadest sense it embraces everything excepting the chemical elements), the term "chemical salts," or "salts," stands for a very definite and specific class of substances, meaning always the product of an acid combined with a base, either alkali or alkaloid. The meaning of the term is thus definitely limited by the scientific classification, based upon the necessary chemical facts and relations, which also determine the ordinary meaning of the term and its commercial sense. Chemical salts is therefore

not a description but a designation. It expresses a law of chemical union which is of force always and everywhere, and under which the combination of an acid with an alkaline or alkaloidal base necessarily and unerringly falls under that term.

It makes no difference how large the list of salts may be, nor how small the list of medicinal preparations in question, though, as a matter of fact, there is no adequate testimony on this point (Ctf., p. 2); the one expresses a definite designation; the other is a vague and general description. This is true, although there may be, as shown in the certificate, a commercial meaning of the term medicinal preparation, identical, however, with the ordinary meaning; and although muriate of cocaine is a medicinal preparation in trade and commerce, and although the term salts or chemical salts is generic. At most, it can be said that muriate of cocaine is covered by both terms, and the question is, which term describes and designates it most accurately and definitely. Tested by the foregoing considerations, it is submitted that the class of chemical salts, however numerous, constitutes a more fully coordinated and specifically designated class than "medicinal preparations." Thus "acids" was held to be a specific designation in *Matheson* v. *United States* (71 Fed. Rep., 394). So, in the case of *Mason* v. *Robertson* (139 U. S., 624, 627), the court in discussing the corresponding provision of the customs act of 1883 uses the following language:

> The designation "all chemical compounds and salts, by whatever name known," includes all chemical compounds and chemical salts used then or

thereafter in any science or art, as clearly as if the proper names of each and all of them had been given.

While the phrase "by whatever name known" does not appear in the equivalent paragraph of the act of 1890, it may truly be said that this phrase renders the provision more emphatic, but it does not render it more precise—it does not include a chemical salt any the more clearly, nor designate it any the more accurately, than if it had been omitted.

Now, the clear intent of Congress, as shown by the language used, in framing paragraphs 74, 75, and 76 is to combine and adjust the separated provisions of previous enactments as to medicinal and proprietary preparations, and the group of chemical compounds in question—medicinal preparations and medicinal proprietary preparations employing alcohol are charged with a duty of 50 cents per pound. This specific duty was adequate and satisfactory where alcohol constituted a part of the preparation under paragraph 74; the *ad valorem* rate was applied to non-alcoholic preparations by paragraph 75, and to "calomel and other mercurial medicinal preparations" by that special designation; and by paragraph 76 an *ad valorem* rate is applied to the alkaloid, distilled oil, and chemical salt class. This is in accordance with the policy as to classification and rates imposed by previous acts. (See tariff act of 1883, paragraphs 92, 93, 118.) This consideration is not obnoxious to the rule that the economical policy of Congress may not be regarded at the expense of violence to the language; it merely brings into relief the proper construction of the

language in order to effectuate the clear intent. Alkaloids and salts, similar to cocaine and its salts, which might be held to be medicinal preparations, are specially provided for, as santonine and its salts by paragraph 78 of the act of 1890; strychnine and its salts by paragraph 87, and quinine and its salts by paragraph 690 of the free list.

Again, we contend that in accordance with this principle and policy, the alcohol under paragraph 74, if not a component part, must be used, not as part of a process merely, or an agency in production, but as part of a result. It must appear in the final product to some extent, or in some form, to constitute a "medicinal preparation in the preparation of which alcohol is used" in the sense of paragraph 74. This language is equivalent to a preparation in which alcohol is used, in which it appears as an ingredient, and that excludes its use merely as a solvent or to effect or perfect crystallization. This is in accordance with the meaning and force of the previous cognate provisions, classifying and defining medicinal preparations. The language of paragraph 75 is persuasive to the same effect. Otherwise, in addition to the phrase "of which alcohol is not a component part" in that paragraph, the phrase "or in the preparation of which alcohol is not used" should appear. Suppose alcohol were not used in the manufacture of muriate of cocaine, would it be claimed to fall under paragraph 75 as a medicinal preparation, of which alcohol is not a component part?

Yet if muriate of cocaine is a medicinal preparation (irrespective of the use of alcohol) rather than a chemical salt for tariff purposes, that is where it ought to be.

Does the mere fact that alcohol is used as a mechanical adjunct or adjuvant of manufacture strengthen the case in any degree?

Furthermore, the association of alkalies or alkaloids and their salts in tariff provisions has been and is a continuous one, both in the provisions for the group before us as developed into the form of the paragraph in the act of 1890 and in special provisions of former and subsequent acts. (E. g. act of 1890, paragraph 35, "morphia *and all salts thereof;*" similarly paragraph 78 as to santonine, and paragraph 87 as to strychnine, and paragraph 690 of the free list as to quinine; see also paragraphs 123 and 521 of the act of 1883; Revised Statutes, section 2504, pages 478, 480, as to morphia and quinine; act of 1894, paragraphs 25, 601.)

The fact that calomel and other mercurial medicinal preparations are specially provided for elsewhere as salts is reason for holding that chemical salts which are used in medicine, or as the materials out of which medicines are prepared, or as medicinal preparations, fall naturally and properly in the intent of Congress under the language of paragraph 76.

It is no objection to this view to say that "chemical salts" also includes salts of alkalies as well as of alkaloids. There could be no other chemical salt than one formed from an alkali or an alkaloid as a base, and since an alkaloid is merely an organic form of alkali, or a substance of organic origin resembling an alkali, the two terms are so similar in their meaning and describe such related objects that "salt of an alkaloid," or "alkaloidal

salt," may well be pointed out by "chemical salt;" so that the designation is none the less definite and accurate for muriate of cocaine because an alkaline salt would also be included in the term. This is the force and effect of the decision in the case of the Mallinckrodt Chemical Works (66 Fed. Rep., 746, 747), viz:

> By the language employed in paragraph 76 Congress has manifested an intention to impose a duty * * * on all of a specific class of organic substances or compounds known as alkaloids or salts.

By "substances" the court plainly refers to alkaloids and by "compounds" to the allied salts, the latter being pointed out by the term "chemical salts." The same relation is intimated by the fact that in ordinary language, in commerce and in tariffs, muriate of ammonia is known as *sal*-ammoniac.

It is merely stating the fact, born of this necessary relation between alkaloids and salts, in another form, to say that paragraph 76 is to be construed as if it read "products or preparations, known as alkalies and alkaloids * * * and all chemical compounds and salts of alkalies and alkaloids," or as if it read "alkalies, alkaloids, and the salts thereof."

We submit, however, that the plain and obvious reading of the law is clearly the correct one; that Congress meant by medicinal preparations in which alcohol was used a class of articles that did not embrace chemical salts, and by chemical salts a class of articles that did not embrace medicinal preparations in which alcohol was used; and that it is straining matters to seek to thus confound what Congress put asunder. See what this

court said about "chemical salts" and how they were to be classified in *Mason* v. *Robertson* (139 U. S., 624, 627).

The act of 1890, section 1, declares that unless otherwise specially provided for in the act, there shall be levied and collected upon all articles mentioned in the schedules therein contained the rates of duty which are by the schedules and paragraphs, respectively, prescribed. That is to say, upon "chemical salts" 25 per cent ad valorem, and upon medicinal preparations in which alcohol is used, 50 cents a pound. The only exception is, otherwise *specially* provided, that is by name or in some other special manner, as distinguished from a general manner.

This seems to indicate that Congress did not understand that the same article was embraced under two paragraphs, or intend the language of one general paragraph to cover what was in another. The law should be interpreted accordingly, and when a paragraph plainly and unquestionably lays a duty upon all "chemical salts," not specially provided for, the presumption arises that language in another general paragraph is not intended to lay a duty upon "chemical salts." This presumption should be overcome only by the most unavoidable indication to the contrary, and not by a forced interpretation of doubtful language. The general intent of Congress to make an absolute separation by paragraphs which do not overlap is a part of the law, and doubtful language should be construed so as to further that intent. Congress affirms, in effect, that its general paragraphs do not conflict, and intends that they shall not. Only an

unavoidable construction should be permitted to make them do so.

The distinction we have pointed out between a "medicine" and a "preparation" is recognized in section 10 of the act concerning "all medicines, preparations, compositions, perfumery, cosmetics, cordials," etc. And in Revised Statutes, 2933 and 2935, heretofore cited, referring to the appraisement and examination of such things, we find "all drugs, medicines, medicinal preparations, whether chemical or otherwise." In Revised Statutes, 2934: "All medicinal preparations, whether chemical or otherwise, usually imported with the name of the manufacturer, shall have the true name of the manufacturer and the place where they are prepared permanently and legibly affixed," etc. Nothing is said in Revised Statutes, 2934, about "drugs" and "medicines," although the distinction just made between them and "medicinal preparations" left them uncovered by Revised Statutes, 2934.

It thus appears that "preparations" and "medicinal preparations," though broad words, were not, in the mind of Congress, equivalent to "drugs" or "medicines," or the articles intended always to be treated in the same way. Yet the appellants' definition of "medicinal preparations" would break down all distinction between "medicines" and "drugs" and "medicinal preparations," including proprietary "medicinal preparations." In the schedule of the Revised Statutes "medicinal preparations" appears to be used only concerning proprietary medicinal preparations, and therefore the same words in Revised Statutes, 2933 and 2935, refer to

such preparations only. Out of these proprietary medicines, popularly called "patent medicines" as a beginning, Congress has extended its attention to similar "medicinal preparations" which did not strictly answer the description of proprietary. But the original character of the class of preparations in other respects continued to be stamped upon the class; and in the process of changing phraseology, Congress enumerated the different kinds of preparations in 1883, a very useless proceeding if all medicines or drugs are included in the words "medicinal preparations."

Though the class thus established be difficult to describe with accuracy, it is not intended to include all medicines or drugs, and therefore the mere fact that the salt known as muriate of cocaine is a medicine or drug does not require it to be considered a "medicinal preparation;" yet an opponent will find it difficult to show any other fact which could be supposed to make it more of a "preparation" than the generality of drugs.

Some attention should be paid to the circumstance that if an exception is intended to be made by one clause of a law to another the exception ordinarily and naturally follows the rule. It is more natural to read section 76 as making an exception of salts from among the medicinal preparations than to read section 74 as making an exception from among salts. Another circumstance already adverted to is the evolution of the sections under consideration from prior legislation, in which, as we have seen, Congress treated "all drugs, medicines, and medicinal preparations," and also "medicinal prepa-

rations" alone as classes, whereof "chemical" drugs, medicinal drugs, medicines, and preparations, or chemical preparations were the species. We are not indeed concerned with scientific, but with Congressional classification, although "chemical salts" means the same thing in any classification, and has a precise signification in science, commerce, and law alike, and this court has said (*Lutz* v. *Magone*, 153 U. S., 105) that the scientific designation of an article is not necessarily to be ignored in fixing its proper classification for duties.

Yet another circumstance heretofore mentioned is the greater definiteness of a description by the nature of a thing than by the accidents of its use and method of manufacture. There is no more certain thing in mathematics than a salt in chemistry; but "medicinal preparations" in which alcohol is used constitute a vague and varying class whereof use, method of manufacture, and distinction from drinks and foods constitute parts of the description. And another circumstance is that Congress, in paragraph 76, itself distinguishes between products, preparations, combinations of these, and chemical compounds and salts, instead of using "preparations" as a word comprehending them all. If Congress used "salts" as a class distinct from "preparations" in paragraph 76, it intended "salts" to be distinguished from "preparations" in a wholly different paragraph. It is proper to point out that this distinction is confirmed by the proviso in the corresponding paragraph in the act of 1894 (paragraph 58, 28 Stat., 511), by which a discrimination was effected, so that no products which might be embraced in the language of paragraph 74 should pay less than 25 per cent.

III.

Even if it should be held that the language of paragraph 74 also embraces muriate of cocaine, the higher rate of paragraph 76 must be exacted under the rule that when two or more rates of duty are applicable the highest shall be imposed.

At the most it may be contended that the descriptions or designations of the merchandise by paragraphs 74 and 76 are equally applicable. This invokes the rule that if two or more rates of duty are applicable to any imported article it shall be classified for duty under the highest of such rates. (*Liebenroth* v. *Robertson*, 144 U. S., 35; *Dieckerhoff* v. *Robertson*, 40 Fed. Rep., 568; *In re Wertheimer*, 55 Fed. Rep., 281.)

The Treasury decisions referred to in the brief for the appellants, pages 9, 22 (to be regarded here only as aids in considering the question), determined for the most part the status of various tinctures, extracts, and proprietary articles. Where chemical salts were passed upon and determined to be medicinal preparations, the ground has been either of their nature, being equivalent to a salt like sulphate of quinia, long and specially recognized in trade and popularly known as a medicine or medicinal preparation, or because of the proprietary nature of the article, or because there is no question as to alcohol forming a component part or being used in the preparation. Some of these rulings involve the very questions which have been referred to this court in this case, as to which, it may be said further, that the course

of construction has not been so long continued, settled, and uniform as necessarily to influence the court on that ground.

Referring briefly to the cases bearing upon the subject, they are not without influence in considering the facts and questions here; in particular, the propositions determined in the Mallinckrodt Case are not erroneous, as contended by the appellants. In the *Appeal of Battle & Co.* (50 Fed. Rep., 402, affirmed in 12 U. S. App., 111), it was determined that chloral hydrate was dutiable under paragraph 76, of the act of 1890, upon the ground that Congress in paragraph 74 had only in mind medicinal preparations in which alcohol is used as an ingredient.

The case *In re Hirzel et al.* (53 Fed. Rep., 1006), passing upon the dutiability of the alkaloid, crude cocaine, supports the view that alkaloids are generally medicinal, and that all medicinal preparations are not alkaloids; that "alkaloid" is a more specific designation than medicinal preparations. This case turned largely upon the evidence presented, but certainly tends to show that a "chemical salt" of alkaloid origin is more specific than "medicinal preparations."

In the *Mallinckrodt Case* (66 Fed. Rep., 746) the importation was identical with that in the present case. It decides these propositions: That the description of both paragraphs is generic and not sufficiently specific to identify the article in question from other drugs and chemical compounds; that there are many alkaloids—a term applied to organic compounds having the properties of alkalies; that they constitute a specific group and

suggest a more precise meaning than "medicinal preparations in the making of which alcohol is used;" that the language employed shows an intention to impose a duty on all of a specific class of organic substances or compounds known as alkaline or alkaloid salts, except where a duty is imposed on certain members of that class by their trade name. And the decision points out that as crude cocaine is clearly dutiable under paragraph 76, and muriate of cocaine is a finished product, it is hardly probable that the finished product was intended to be dutiable at a less rate than the crude.

To the last consideration it may be added that to admit such a chemical salt as this at a rate of duty of 50 cents per pound would be, one might well say, an untenable proposition, being equivalent, as matter of fact, to 1 per cent, or less, *ad valorem;* while the "catch-all" clause of the tariff of 1890 (section 4) imposed a duty of 10 per cent *ad valorem* on all nonenumerated, raw, or unmanufactured articles; and on all articles manufactured in whole or in part not provided for in the tariff act, a duty of 20 per cent *ad valorem.* The whole scheme of the tariff act may well be regarded in determining the construction of its various provisions; and no possible intention of Congress can be conceived to admit such high-grade preparations as these very expensive medicinal salts at a rate of duty which would be almost equivalent to putting them upon the free list, which Congress has carefully avoided doing.

Consequently we conclude that the term "medicinal preparations in the preparation of which alcohol is used"

is descriptive, and that the term "chemical salts" in itself, and as plainly designating "alkaloidal salt" or "salt of an alkaloid," is denominative and creates a more specific classification, and even if it should be held that both are generic and not sufficiently specific to identify the article among other drugs, compounds or preparations, nevertheless the language of paragraph 76 is more accurate and more truly describes and classifies the product muriate of cocaine than paragraph 74.

It is therefore respectfully submitted that the first question propounded should be answered in the negative, and, by consequence, that the second question should be answered in the affirmative.

HENRY M. HOYT,
Assistant Attorney-General.

FINK *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 120. Argued April 28, 1898. — Decided May 23, 1898.

Muriate of cocaine is properly dutiable under paragraph 74 of the tariff act of October 1, 1890, and not under paragraph 76 of that act.

THE case is stated in the opinion.

Mr. Albert Comstock for appellants.

Mr. Assistant Attorney General Hoyt for appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

This record presents for consideration certain questions of law certified to this court by the Court of Appeals for the Second Circuit. The certificate and questions therein stated are as follows:

"A judgment or decree of the Circuit Court of the United States for the Southern District of New York having been made and entered February 4, 1895, by which it was ordered, adjudged and decreed that there was no error in certain proceedings herein before the board of United States general appraisers, and that their decisions herein be, and the same are hereby, in all things affirmed, and an appeal having been taken from said judgment or decree to this court by the above-named appellants, and the cause having come on for

hearing and argument in this court, certain questions of law arose concerning which this court desires the instruction of the Supreme Court of the United States for its proper decision. The facts out of which such questions arose are as follows:

"The firm of Lehn & Fink imported into the port of New York, on April 6, 1894, certain parcels of muriate or hydrochlorate of cocaine in crystals, on which duty was exacted at twenty-five per cent, ad valorem, under paragraph 76 of the tariff act of October 1, 1890, c. 1244, 26 Stat. 567, as a chemical salt. The importers duly and seasonably protested against such exaction, upon the ground that the merchandise was dutiable at fifty cents per pound under paragraph 74 of the same act as a medicinal preparation in the preparation of which alcohol is used. After decisions by the board of general appraisers and by the United States Circuit Court of New York the question duly came by appeal from the decision of the Circuit Court to this court.

"Paragraphs 74 and 76 of said act are as follows:

"'74. All medicinal preparations, including medicinal proprietary preparations, of which alcohol is a component part, or in the preparation of which alcohol is used, not specially provided for in this act, fifty cents per pound.'

"'76. Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils and all combinations of the foregoing, and all chemical compounds and salts, not specially provided for in this act, twenty-five per centum ad valorem.'

"Muriate of cocaine is an alkaloidal salt and is a chemical salt produced by combination of the alkaloid cocaine and muriatic acid. Salts are either alkaloidal or alkaline, produced by combination of either alkaloid or alkalies with acids. In its preparation alcohol is necessarily used as a solvent. Muriate of cocaine is a medicinal preparation and is known as such by the physician, the chemist, the druggist and in commerce, and was so known definitely, generally and uniformly at and prior to the enactment of the tariff law of 1890. The term 'salts' or 'chemical salts' is a generic term and includes a commercial class of articles known by chemists and by phar-

macists and druggists at the date of the passage of the tariff act as covering, among others, muriate of cocaine. The commercial meaning of the term 'medicinal preparation' is the same as its ordinary meaning, viz., a substance used solely in medicine and prepared for the use of the apothecary or physician to be administered as a remedy in disease. Muriate of cocaine is dispensed in the form in which it is imported, or more often reduced therefrom to a powder by means of a mortar and pestle, or diluted in water or admixed with inert or neutral matter.

"The number of chemical salts is excessively large. A very small proportion of this number is used in medicine or as medicinal preparations. There is no adequate testimony in regard to the relative number of imported or importable medicinal preparations in the preparation of which alcohol is used, and of imported or importable chemical salts. The testimony does not disclose which paragraph includes the greater number of articles.

"Upon the foregoing facts the questions to be certified are:

"1. Is muriate of cocaine properly dutiable under paragraph 74 of the tariff act of October 1, 1890?

"2. Is muriate of cocaine properly dutiable under paragraph 76 of the tariff act of October 1, 1890?

"And to that end this court hereby certifies such questions to the Supreme Court of the United States."

There can be no doubt that the article in question from some points of consideration might be classified under either of the paragraphs of the statute referred to in the certificate. Thus, within the purview of paragraph 74, it is obviously a medical preparation, in the preparation of which alcohol is used. It is also equally clear that it is likewise, chemically speaking, a salt, and hence within the reach of paragraph 76. It would then follow that if either of the paragraphs stood alone in the statute, disembarrassed of the provisions found in the other, the preparation might properly come under the head of either. Being reached, then, in some of its aspects by some of the provisions found in both paragraphs, the question is, which, if either of the two, is so dominant in its con-

trol of the article in question as to exclude the operation thereon of the other. The rule is that this, if possible, is to be determined by ascertaining whether one of the two paragraphs is more definite in its application to the article in question than is the other. *Isaac* v. *Jonas*, 148 U. S. 648; *Bogle* v. *Magone*, 152 U. S. 623. Being a medicinal preparation, made as such and solely used as a medicine, the language of paragraph 74 clearly more definitely applies to it than does the generic provision "of chemical compounds and salts" found in paragraph 76. *Magone* v. *Heller*, 150 U. S. 70; *Robertson* v. *Salomon*, 130 U. S. 412. The fact that the certificate states that "muriate of cocaine is a medicinal preparation, and is known as such by the physician, the chemist, the druggist and in commerce, and was so known definitely, generally and uniformly at and prior to the enactment of the tariff law of 1890," becomes a factor, adding cogency to the demonstration that the article falls with more definite certainty under the classification of a medicinal preparation than it does under that of a chemical salt. *De Jonge* v. *Magone*, 159 U. S. 562; *Berbecker* v. *Robertson*, 152 U. S. 373; *Robertson* v. *Salomon*, 130 U. S. 412. And the force of this view is not weakened by the statement in the certificate that the term "'salts,' or 'chemical salts' is a generic term, and includes a commercial class of articles known by chemists and by pharmacists and druggists at the date of the passage of the tariff act as covering, among others, muriate of cocaine." In reason, the result of the certified facts is simply this, that muriate of cocaine is in its narrow aspect a medicinal preparation, in its wider a chemical salt, and hence that chemical salt is a generic term designating all articles of that character, and hence embracing muriate of cocaine as the genus, must as a matter of course contain within itself the species which are embodied in it. In its ultimate analysis, therefore, the question asked is only this: Is the genus, chemical salt, more comprehensive than the species, muriate of cocaine?

Thus understood, it becomes of course necessary to answer the first question in the affirmative and the second in the negative, and it is so ordered.